(1) Supreme Court, U.S.
FILED
00-525 OCT 4 2000
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

CHARLES J. ACKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RALPH A. KALAL
Counsel of Record
KALAL AND ASSOCIATES
217 S. HAMILTON STREET
5TH FLOOR
MADISON, WI 53703
(608) 255-9295

Counsel for Petitioner
Charles J. Acker

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

23pp

QUESTION PRESENTED

1. Does police use, without a search warrant, of "thermal imaging" surveillance to observe activities occurring within a dwelling by measuring heat radiated from the dwelling violate the Fourth Amendment?

PARTIES TO THE PROCEEDINGS

The parties are:

Charles J. Acker, petitioner and claimant-appellant is an individual and has no corporate affiliations.

United States of America, plaintiff-appellee

Real Property Located at 15324 County Highway E, Richland County, Wisconsin, with all appurtenances and improvements thereon, the *res* and nominal defendant in this action.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

Conclusion 11

Appendix

Appendix A
Decision of the United States Court of Appeals for the Seventh Circuit in *US v. Real Property Located at 15324 County Highway e, Richland Center, Richland, Wisconsin*, No. 99-3190, filed July 6, 2000 . . . . . 1a

TABLE OF AUTHORITIES

Cases

Commonwealth v. Gindlesberger,
743 A.2d 898 (1999) 8

Katz v. United States,
389 U.S. 347 (1967) 7, 8, 9, 10

Miller v. United States,
357 U.S. 301 (1958) 10

People v. Deutsch,
44 Cal.App.4th 1224, 52
Cal.Rptr.2d 366 (1st Dist. 1996) 8

State v. Siegal,
281 Mont. 250, 934 P.2d 176 (1997) 8

State v. Young,
123 Wash.2d 173, 867 P.2d 593 (1994) 8

United States v. Field,
855 F.Supp. 1518 (W.D.Wis. 1994) 8

United States v. Kyllo,
140 F.3d 1249 (9th Cir. 1998) . . . . . *passim*

United States v. Myers,
46 F.3d 668 (7th Cir. 1995) 6

United States v. Real Property Located at 15324 County Highway E, Richland Center, Richland County, Wisconsin
219 F.3d 602 1

United States v. Ross,
456 U.S. 798 (1982) 10, 11

Constitutional Provisions and Statutes:

U.S. Const., Amend. IV . . . . . *passim*

21 U.S.C. § 881 . . . . . 2, 3

28 U.S.C. § 1254(1) 1

PETITION FOR WRIT OF *CERTIORARI*

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in *United States v. Real Property Located at 15324 County Highway E, Richland Center, Richland County, Wisconsin; Appeal of Charles J. Acker*, on July 6, 2000, to resolve conflicts between the federal courts of appeal and the highest courts of several states concerning whether police use of "thermal imaging" surveillance to monitor activities within a dwelling requires prior judicial approval by the issuance of a search warrant and to allow this Court's decision in *Kyllo v. United States*, no. 99-8508, *certiorari granted* September 26, 2000, to control the identical issue in the present case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America v. Real Property Located at 15324 County Highway E, Richland County, Wisconsin; Appeal of Charles J. Acker*, no. 99-3190, appears in Appendix A to the petition. The opinion is published at 219 F.3d 602.

JURISDICTION

The date on which the United States Court of Appeals for the Seventh Circuit decided this case was July 6, 2000. A copy of that decision appears in Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C. § 881.

> (a) Subject property
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner

to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

This is a civil action for *in rem* forfeiture brought in the district court under 21 U.S.C. § 881. The Petitioner is the owner of the real property which was ordered forfeited after the district court denied Petitioner's motion to suppress evidence and granted summary judgment of forfeiture to the Government.

During the early part of March, 1998, police in Richland County, Wisconsin conducted "thermal imaging" surveillance of the Petitioner's dwelling, the *res* in the forfeiture action. The police had not obtained a warrant to do this.

"Thermal imaging" is a technique for measuring the heat coming from inside a dwelling or other structure. It utilizes a device which is aimed at the house and measures heat emanating from a building. By measuring differences in the intensity and levels of heat coming from various parts of the dwelling, the device is able to create an image of the heat sources within the structure. By this, it is possible to determine what devices are creating the heat and what activities are being conducted within the dwelling that generate the radiated heat.

The police aiming a thermal imager at the Petitioner's house saw images "consistent with the unusual and uneven heat generated by indoor grow lights which are commonly used for indoor cultivation of marijuana." From outside the dwelling, the police pointed the thermal image device at the

Petitioner's basement under an enclosed screen porch and determined that the southeast corner and east side of the residence had more heat coming from them than did the rest of the house. From this, the police concluded that "there appeared to be an unexplained heat source under the enclosed porch of the residence" which was "consistent with unusual and uneven heat generated by indoor grow lights which are utilized for the indoor cultivation of marijuana."

Petitioner had insulated a basement window. This blocked some of the heat radiation, as measured by the thermal imager. The police viewed this as incriminating, too. They claimed that the insulating of a basement window was also evidence of a grow operation. The police believed that "individuals who are cultivating marijuana attempt to conceal the marijuana grow by commonly blocking out windows and venting the marijuana grow to an area which cannot be detected by law enforcement."

From the thermal imaging surveillance of the Petitioner's home, the police concluded that the thermal images were "consistent with persons involved in the illegal manufacture of controlled substances/marijuana."

Police had not obtained a warrant before conducting this thermal imaging surveillance of the Petitioner's house. Once they had completed the thermal imaging of the dwelling, however, they applied for a search warrant based on the results of the thermal imaging. The application for the warrant recited the information which has been set out above. That warrant was issued. When it was executed, police found 18 growing marijuana plants in the basement of Petitioner's home.

The Government filed an action for forfeiture *in rem* in the United States District Court for the Western District of Wisconsin. Petitioner filed a claim. He then answered the Government's forfeiture complaint and also moved to suppress the evidence obtained in the search of his home.

In both the Answer and the suppression motion, Petitioner asserted that the thermal imaging surveillance of the house constituted a search, within the meaning of that term in the Fourth Amendment, and that this search violated the Fourth Amendment because no judicially issued warrant had been issued in advance of the thermal imaging search. In both the Answer and the suppression motion, Petitioner argued that thermal imaging surveillance of the residence was a search because it exposed to police view activities occurring within the home in which Petitioner had a subjective expectation of privacy which was objectively reasonable.

The sworn police application for the search warrant detailing the observations made by the thermal imaging surveillance was included with the suppression motion and provided a factual basis for the evidentiary hearing which the motion requested. In his Answer, Petitioner asserted that the police were "essentially able to see into the residence, into an area in which the claimant subjectively expected privacy and into an area which society objectively and reasonably regards as private: the interior of one's dwelling."

The Petitioner relied before the district court upon *United States v. Kyllo,* 140 F.3d 1249 (9th Cir. 1998), in which a panel of that Court had concluded that thermal imaging surveillance by police constituted a "search" and, hence, required a search warrant. On September 26th of this year, this Court granted *certiorari* in *Kyllo* to review the same issue as is presented in Petitioner's case.

Though the Ninth Circuit's opinion in *Kyllo*, upon which Petitioner relied in the district court, held that thermal imaging is a search, Wisconsin is in the Seventh Circuit. The Wisconsin district court concluded that it was bound to deny the suppression motion, holding that the Seventh Circuit had held in *United States v. Myers*, 46 F.3d 668 (7th Cir. 1995), that thermal imaging is not a search, as a matter of law. Hence, the district court conducted no hearing on the Petitioner's motion, even though the motion had expressly requested an evidentiary hearing.

The legal status of thermal imaging was the only issue in the case. After the district court denial of the suppression motion, the Government moved for summary judgment, and the district court granted that motion, also without hearing, on August 3, 1999. The district court entered judgment of forfeiture against the *res* on August 9, 1999.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit.

While the present case was pending on appeal, the Ninth Circuit vacated the panel decision in *Kyllo* upon which Petitioner had relied in the district court. Instead, it issued an *en banc* opinion holding that thermal imaging is not a search, but merely the collection of abandoned heat. The *en banc* opinion in *Kyllo* adopted reasoning indistinguishable from that employed by the Seventh Circuit in *Meyer*. It is this *en banc* opinion of the Ninth Circuit in *Kyllo* which has now been accepted for *certiorari* review by this Court.

The Seventh Circuit affirmed the judgment of forfeiture. First, it reaffirmed the holding of *Myer* that thermal imaging surveillance is not a search. In so doing, it asserted that the Petitioner had not proved the intrusive

capabilities of the thermal imager used on his house – despite the fact that Petitioner had specifically requested an evidentiary hearing and included the sworn police application reciting the information which the police had learned from that surveillance. The Seventh Circuit concluded by citing cases from other circuits arriving at the same conclusion, including the *en banc* opinion of the Ninth Circuit in *Kyllo*. The Seventh Circuit stated that "we have no inclination to break ranks with our sister circuits and our own precedent."

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of *certiorari* because this case presents the identical issue upon which the Court has already granted review in *Kyllo v. United States,* no. 99-8508, *certiorari granted,* September 26, 2000. This case is merely the Seventh Circuit's version of the Ninth Circuit's *en banc* opinion in *Kyllo*. Hence, this case should be resolved on the basis of the forthcoming opinion of this Court in *Kyllo*, which presents the identical issue. The Petitioner should not lose his house merely because the Ninth Circuit's opinion reached this Court first in time.

This Court should also grant the writ because the Fourth Amendment rights of Americans should not depend on the coincidence of their place of residence or the accident of the venue, federal or state, of prosecution. Though federal courts of appeals have, although far from seamlessly or unanimously, adopted the view that thermal imaging is nothing but the collecting of waste heat, the State courts, relying on this Court's precedent in of *Katz v. United States*, 389 U.S. 347 (1967), and ensuing cases, have held that thermal imaging is a search.

On reasoning identical to that expressed by the panel in *Kyllo*, the Pennsylvania Supreme Court in *Commonwealth v. Gindlesberger*, 743 A.2d 898 (1999), held that warrantless thermal imaging surveillance is a search and violates the Fourth Amendment. Both the Supreme Courts of Washington and Montana have held warrantless thermal imaging surveillance violates the Fourth Amendment, as has the California Court of Appeals. *State v. Young*, 123 Wash.2d 173, 867 P.2d 593 (1994); *State v. Siegal*, 281 Mont. 250, 934 P.2d 176 (1997); *People v. Deutsch*, 44 Cal.App.4th 1224, 52 Cal.Rptr.2d 366 (1st Dist. 1996). Indeed, even the same district court that ruled against the Petitioner held in another case, before the Seventh Circuit issued its opinion in *Myer*, that thermal imaging surveillance without a warrant violates the Fourth Amendment. *United States v. Field*, 855 F.Supp. 1518 (W.D.Wis. 1994).

Even more compellingly, this Court should also grant the writ because the decision of the Seventh Circuit in this case, as is the *en banc* decision of the Ninth Circuit in *Kyllo*, is utterly contradictory to the values and purposes of the Fourth Amendment. The process by which these Courts of Appeal have arrived at the conclusion that thermal imaging surveillance is not a search permits police to vaporize the sanctity of the home by the clever use of advanced technology. In so doing, the Courts of Appeal have ignored the guiding principle of *Katz* -- that "the Fourth Amendment protects people," not places, *id.*, at p. 353.

Katz held that wiretapping a telephone conversation emanating from a phone booth violated the Fourth Amendment. "The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.*, at 353. It was the penetration into privacy, not penetration into

physical space, which became the governing *criterion* under the Fourth Amendment. To make this point, the *Katz* court framed words which have come to be define the scope of the Fourth Amendment:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id., at 351.

This Constitutional principle, however, is now being ignored. As a blanket proposition, the Seventh Circuit has held that thermal imaging is not a search, even though it reveals - and has no purpose other than to reveal -- the activities within the home, activities which the resident has acted in the most common way - by keeping them hidden within his home - to keep private. Moreover, the act of attempting to shield the privacy of the home from this high-tech intrusion is itself treated by the police as suspect: in the present case, police claimed insulating a basement window was evidence of marijuana growing.

The purpose of thermal imaging is to give police a view into a person's dwelling. Police wouldn't use it if it didn't do that. It is this capability which gives it its name: "thermal *imaging*." Thermal imaging isn't an enhancement to a capability that people already possess. Thermal imaging is a means by which to give police a capability that no one possesses normally -- the ability to see through walls. Thermal imaging is seeing something that otherwise could not be seen. It does not enhance a capability. It creates a

capability. It creates the capability to gain information about something that is happening *inside* the house.

The present case is identical to *Katz* in every manner except the type of energy wave being captured, i.e. thermal imaging. In *Katz*, police using a parabolic microphone captured the sound waves generated when the glass of the telephone booth vibrated, reflecting outward those sound waves created by the individual speaking into the telephone inside the booth. In the present case, the police, using a thermal imager captured the heat waves generated by the private activities in which the Petitioner engaged behind the walls of his home. There is no principled distinction which can be drawn between these two circumstances, and virtually no factual distinction.

The approach which the Court of Appeals for the Seventh Circuit has taken in the present case, in company with the *en banc* court in *Kyllo*, was rejected over two hundred years ago:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; *the wind may blow through it*; the storm may enter; the rain may enter; but the King of England cannot enter--all his forces dare not cross the threshold of the ruined tenement."

William Pitt, quoted, as a bedrock of Constitutional principles embodied in the Fourth Amendment, *Miller v. United States*, 357 U.S. 301, 307 (1958); and, *United States v. Ross*, 456 U.S. 798, 822 n. 31 (1982).

If the Fourth Amendment allows police to surreptitiously spy on private activities within the dwelling by measuring the heat those activities generate, then this principle is no longer operative. If this is all the Fourth Amendment means, then that Amendment becomes little more than a compelling advertisement for insulation. The cherished principle that even "the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion," *United States v. Ross*, 456 U.S. 798, 822 (1982), will be the detritus of technology.

CONCLUSION

This case is not a test of technology. It is a test of the Fourth Amendment. Ultimately, the issue presented by this case is basic: Is the Fourth Amendment obsolete?

Respectfully submitted, this 4th day of October, 2000.

/s/_____
RALPH A. KALAL
KALAL & ASSOCIATES
Attorneys for Petitioner
217 South Hamilton Street, Fifth Floor
Madison, Wisconsin 53703
608.255.9295

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Decided July 6, 2000]

No. 99-3190

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REAL PROPERTY LOCATED AT 15324 COUNTY HIGHWAY E, RICHLAND CENTER, RICHLAND COUNTY, WISCONSIN, with all appurtenances and improvements thereon,
Defendant,

APPEAL OF: CHARLES J. ACKER,
Claimant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 98-C-718-C - Barbara B. Crabb, *Judge*.

Argued March 1, 2000

Before ESCHBACH, COFFEY, and DIANE P. WOOD, *Circuit Judges*.

OPINION

Diane P. Wood, *Circuit Judge*. The year 1984 came and went without the government's transformation into the ubiquitous and all-seeing Big Brother of George Orwell's book. (This, at least, is how everyone but dyed-in-the-wool conspiracy devotees would characterize things.) But, on the other hand, the technologies the government has at its disposal to investigate ordinary citizens become more sophisticated by the day. This case involved thermal imaging technology, which the police used to deduce that Charles J. Acker was running a substantial marijuana operation from the property that is the nominal defendant here. Acker was caught, and in time the government filed a civil action for forfeiture of his property under 21 U.S.C.§ 881(a)(7). Acker resisted on the ground that the use of thermal imaging constituted a warrantless search. Relying on this court's decision in *United States v. Myers*, 46 F.3d 668 (7th Cir. 1995), the district court rejected his claim. Even Acker concedes that he must lose if *Myers* remains good law. We are not persuaded that it should be reconsidered, and we therefore affirm the judgment of the district court.

The underlying facts are typical of these cases. In late 1997, Richland County Deputy Sheriff Rick Wickland received a tip from two confidential informants that Acker was selling large amounts of marijuana. Wickland confirmed that Acker resided at 15324 County Highway E in Richland County, Wisconsin. He next obtained copies of Acker's electric bills for April 1996 through January 1998, and

discovered the high usage that usually goes along with indoor cultivation of marijuana.

The next step was a thermal inspection of 15324 County Highway E. Between 1:00 and 1:30 a.m. on March 6, 1998, Wisconsin Department of Narcotics Enforcement Special Agent Peter M. Thelen went to the house. From positions on the road and in a field adjacent to the property, Thelen scanned the residence using a SEEKIR Thermal Imager with an attached 8mm video recorder. He found what he was looking for: the imager showed that large amounts of heat were being vented from the northeast and southeast corners of the basement, and that there was an unexplained heat source under the porch.

Based on those three pieces of information (the CI tips, the utility records, and the thermal imaging results), Wickland obtained a search warrant for Acker's residence. The search yielded packaged marijuana, a triple beam scale, live marijuana plants, 1000 watt lights, box fans, and other materials consistent with a marijuana growing operation. There were three separate "grow" areas in the basement; two of those had exhaust fans that were connected to ducts that vented out the northeast corner of the house. Acker, who was there while the officers executed the warrant, confessed to growing marijuana.

The United States filed the present civil action for forfeiture of the property on October 13, 1998, under 21 U.S.C. § 881(a)(7). That statute provides for the forfeiture of property used or intended to be used to commit or facilitate the manufacture, sale, or distribution of a controlled substance. The complaint and warrant of arrest *in rem* were

served on Acker on November 4, 1998. Acker responded immediately with a claim to the property on November 5; he also filed a motion to suppress both the thermal imaging evidence and everything that was collected under the warrant, as well as a motion to dismiss the complaint, on November 25, 1998. With respect to the suppression, he argued that the thermal imaging itself was an unconstitutional warrantless search, and the evidence collected under the warrant represented the fruits of the first violation.

As Acker acknowledges, this court has already had occasion to consider the question "whether thermal imaging is a search within the meaning of the Fourth Amendment." *Myers, supra*. On facts remarkably similar to those in Acker's case, we concluded that it was not. We found that Myers did not have a reasonable expectation of privacy in the heat emitted from his home, and that even if he did, such an expectation is not one that society would recognize as reasonable. 46 F.3d at 669-70. Instead, the heat emanations were more like garbage left at the curbside, smoke rising from a chimney, and the scent of drugs dogs can detect in luggage, none of which gives rise to protectible expectations of privacy.

We were also careful in *Myers* to note that the thermal imaging scanner used there, an Agema 210, was not capable of transmitting images so precise that expectations of privacy might be triggered. Neither it, nor, as far as the record here shows, the SEEKIR Thermal Imager pointed at Acker's house is (as Acker colorfully puts it) the modern equivalent of Superman's X-ray vision. Acker paints a frightening picture of thermal imagers so sensitive that they create a precise video image of every living thing in the house, revealing facial

features, body positions, who is walking through a kitchen, and who is in the bedroom engaged in sexual activity. We agree that a device of such power would present important questions under the Fourth Amendment. But, as in *Myers*, we have no such case before us here.

Acker's lawyers did ask for an evidentiary hearing, in part because they hoped to introduce evidence about the precise capabilities of the SEEKIR Thermal Imager. How, they ask, will anyone know without hearings in these cases when newer devices begin to approach the capabilities of a conventional video camera hidden in the house, or the sophisticated ultrasound equipment in everyday use in hospitals all over the country?

This is an interesting point, but it is unfortunately one that Acker did not make with any clarity before the district court. In order to prevail on a claim that the district court erred in denying him an evidentiary hearing, Acker must show that the parties disputed material issues of fact. *United States v. Torres*, 191 F.3d 799, 811 (7th Cir. 1999). That burden may be met only by showing "definite, specific, detailed, and nonconjectural facts." *Id.* (citing *United States v. Rodriguez*, 69 F.3d 136, 141 (7th Cir. 1995) (internal quotations omitted)). If Acker had wanted to pursue the possibility left open in *Myers*, he should have proffered evidence suggesting that the capabilities of the SEEKIR were sufficiently better than those of the device in *Myers* such that the Fourth Amendment analysis would be affected. He did not, and even now, his suggestion that such evidence might exist is sheer speculation.

At the time this court decided *Myers*, the Eighth and the Eleventh Circuits had already come to the same conclusion about thermal imaging scans - that they were not "searches" within the meaning of the Fourth Amendment. See *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994); *United States v. Ford*, 34 F.3d 992 (11th Cir. 1994). Since then, the Fifth and the Ninth Circuits have agreed with this position. See *United States v. Ishmael*, 48 F.3d 850 (5th Cir. 1995); *United States v. Kyllo*, 190 F.3d 1041 (9th Cir. 1999). No one has come to the opposite conclusion, except the Tenth Circuit briefly, in *United States v. Cusumano*, 67 F.3d 1497 (10th Cir. 1995), in an opinion that was quickly vacated, and on rehearing *en banc* that issue was not decided. See 83 F.3d 1247 (10th Cir. 1996). On the present record, and bearing in mind the type of technology the police here used, we have no inclination to break ranks with all our sister circuits and our own precedent. *Myers* remains good law, and the district court correctly recognized that it required the rejection of Acker's effort to suppress the evidence.

The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit